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ORIGINAL

NO. 85-6648

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JOHN NORMAN HUFFINGTON,

Petitioner

v.

STATE OF MARYLAND,

Respondent

BRIEF AND APPENDIX IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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2. Whether exclusion of the transcribed testimony of an unavailable witness, inadmissible as former testimony, comports with the law of evidence and federal due process?

3. Whether Maryland's statutory form indictment for murder sufficiently charged Petitioner with first degree murder?

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The State of Maryland, Respondent, by its attorneys, Stephen H. Sachs, Attorney General of Maryland and Deborah K. Chasanow, Assistant Attorney General, submits that the Petition for Writ of Certiorari should be denied, no substantial federal question having been presented in the Petition.

STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case.

REASONS FOR DENYING THE WRIT

I.

THE RECENT CLARIFICATION OF THE OPERATION OF THE MARYLAND CAPITAL SENTENCING STATUTE DOES NOT CONSTITUTE A CHANGE IN THE LAW AND FIRMLY ESTABLISHES THE CONSTITUTIONALITY OF THE ALLOCATION OF THE BURDEN OF PERSUASION.

Petitioner contends that the Maryland Court of Appeals, through announcing its decision in Foster v. State, 304 Md. 439, 499 A.2d 1236 (1985), violated both the Fourteenth Amendment to the United States Constitution by rendering the Maryland Capital Punishment Statute "unduly vague with respect to those persons convicted prior to the reconstruction," (Petition p.16), and the Eighth Amendment to the United States Constitution by rendering "the imposition of the death penalty on some persons arbitrary and capricious." (Petition p.17). In support of these claims, Petitioner contends that the Maryland Court of Appeals' decision in Foster constituted a "reconstruction" of the statute which varied the burden of persuasion from that employed in Petitioner's case. He contends that the procedure employed in his case placed the ultimate burden of persuasion upon him with regard to obtaining a life sentence, instead of death. However, a review of the Maryland Court of Appeals opinion in Foster, together with prior decisions interpreting Art. 27, §413 of the Maryland Annotated Code, reflects that the Foster opinion did not change the law. Rather, the opinion restated that which had been pronounced in Tichnell v. State, 287 Md. 695, 730, 415 A.2d 830 (1980), the first decision rendered by the

Court of Appeals under the current death penalty statute. As the law never changed, there was no unconstitutional vagueness, arbitrariness or capriciousness, or improper allocation of burden. As a result, review is unwarranted.[1]

In Tichnell v. State, 287 Md. at 730, 415 A.2d at 849, the Maryland Court of Appeals stated:

> "Because the State is attempting to establish that the imposition of the death penalty is an appropriate sentence, the statute places the risk of nonpersuasion on the prosecution with respect to whether the aggravating factors outweigh the mitigating factors."

This holding was reiterated by the court in Trimble v. State, 300 Md. 387, 415 n.16, 478 A.2d 1143, 1157 n.16 (1984), cert. denied, ___ U.S. ___, 105 S.Ct. 1231, 84 L.Ed.2d 368 (1985), where it stated:

> "In Tichnell I, we also construed Section 413(h)(2), which provides that the trier of fact shall determine whether 'the mitigating circumstances outweigh the aggravating circumstances,' to place the burden of persuasion on the prosecution."

The holding of the Court of Appeals in Foster v. State, supra, did not constitute a deviation from this previously announced law. Rather, the Court merely reiterated that when

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[1] Petitioner's challenge relates solely to the facial validity of the Maryland capital punishment statute. As noted by the Maryland Court of Appeals in its decision on Motion for Reconsideration, Foster, et al. v. State, 305 Md. 306, (1986), any challenge to the instructions has been waived under State law for failure to raise the issue at trial or on direct appeal. It is clear that Petitioner would have been entitled to an instruction informing the jury that in weighing aggravating and mitigating circumstances, if there were an even balance, the sentence should be life, had one been requested.

evidence is weighed, no burden is imposed upon either party. In this ultimate balance, if the aggravating factors outweigh the mitigating factors the sentence is death; if the mitigating factors outweigh the aggravating factors, the sentence is life; if the mitigating factors and aggravating factors are in a state of even balance, the appropriate sentence is life because the State (as the moving party) bears the risk of nonpersuasion.[2] As there was no deviation from existing law, the Maryland Capital Punishment Statute is not overly vague in contravention of the Fourteenth Amendment, and does not result in the arbitrary and capricious imposition of

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[2] In support of his contention under the Fourteenth Amendment, Petitioner cites Ashton v. Kentucky, 384 U.S. 195 (1966), and Hicks v. Oklahoma, 447 U.S. 343 (1980) for the proposition that a limiting construction cannot be applied to affirm the decision in the case in which the limitation was announced. The flaw in Petitioner's contention, aside from the fact that there was no reconstruction here, however, is that the Ashton restriction applies only where the new interpretation saves that which would have been unconstitutional. Assuming that the Foster decision transferred the burden of persuasion to the State, there remains no infirmity as imposing the burden on the defendant is not unconstitutional. See Proffitt v. Florida, 428 U.S. 242 (1976) (scheme in which death is presumed after one or more aggravating circumstances is found unless overridden by mitigating factors constitutional). Cf. Patterson v. New York, 432 U.S. 197 (1977).

sentence in violation of the Eighth Amendment.[3] There is simply nothing in the reiteration of prior holdings in the Foster opinion that would serve to violate the Federal Constitution.

Petitioner additionally contends that review of his case is warranted because he was tried under the interpretation of the law that existed prior to the Foster decision, an interpretation that he alleges is unconstitutional. However, as noted above, Foster did not initiate any change in the law. It was the law from the time of the first decision under the existing statute. As a result, his contention on this basis must be rejected.

He further asserts that even if the burden were properly allocated to the State, the statute is nevertheless unconstitutional because the ultimate weighing does not require a finding "beyond a reasonable doubt." However, Petitioner once again erroneously talks in terms of burden with respect to a weighing of one set of circumstances against another. As

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[3] Petitioner's reliance upon Bouie v. City of Columbia, 378 U.S. 347 (1964), in asserting that at the time he was sentenced (prior to Foster) the statute was unconstitutionally vague is misplaced. In Bouie, the South Carolina appellate court expanded the definition of the trespass statute beyond its specific terms in order to find the evidence sufficient in Bouie's case. Here, on the other hand, the judicial interpretation was not contrary to the legislative enactment. See Stebbing v. Maryland, ___ U.S. ___, 105 S.Ct. 276, 280, 83 L.Ed.2d 212, 217 (1984) (Marshall, J., dissenting on denial of certiorari) (Maryland statute is silent as to burden on ultimate weighing). Moreover, the South Carolina courts had never interpreted the trespass statute to include Bouie's conduct until after Bouie's arrest. The Maryland Court of Appeals, on the other hand, had interpreted the statute with respect to burdens prior to Petitioner's trial.

noted by the Maryland Court of Appeals, "ordinarily in such a balancing process, a court simply determines which side outweighs the other, without being concerned with how much or how clearly one side may outweigh the other." Foster v. State, 304 Md. at 477. The Court of Appeals had earlier rejected an identical contention in Tichnell v. State, 287 Md. at 732-733, 415 A.2d at 849-850, relying upon this Court's decision in Patterson v. New York, 432 U.S. 197 (1977). In Patterson, this Court

> "decline[d] to adopt as a constitutional imperative, operative country wide, that a state must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused. Traditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society's interests against those of the accused have been left to the legislative branch." 432 U.S. at 209-10.

Under the Maryland scheme, the State is required to prove beyond a reasonable doubt that the defendant is guilty of first degree murder, that he was a principal in the first degree or contracted for the murder of another, and that at least one aggravating factor is present. The defendant is then provided an opportunity to present evidence to help the jury find the existence of any mitigating factor established

by a preponderance of the evidence.[4] It is then up to the sentencer to weigh the evidence in aggravation against the mitigating factors found to exist under a preponderance standard in order to determine the ultimate sentence. There is no unconstitutional allocation of burden or standard in this scheme. As a result, review of the first two contentions presented by Petitioner is unwarranted.

II.

THE MARYLAND COURT'S DECISION THAT THE TRANSCRIBED TESTIMONY OF STEPHEN RASSA WAS INADMISSIBLE AS FORMER TESTIMONY COMPORTS WITH WELL ESTABLISHED EVIDENTIARY LAW AND FEDERAL DUE PROCESS.

Petitioner's co-defendant, Deno Kanaras, was separately tried. The State did not seek the death penalty in the Kanaras case, apparently due to a lack of evidence that he was a principal in the first degree to the murder of either victim Hudson or Becker. The evidence against Kanaras consisted primarily of the latter's admission that he was an eyewitness and participant in the events culminating in the homicides. Kanaras claimed, however, that he was an unwilling participant whose presence and assistance was induced by the threats from

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[4] The defendant has no obligation to produce evidence or prove mitigating factors. As stated in Foster, 304 Md. at 474, 499 A.2d at 1254: "[R]egardless of what evidence a defendant himself may or may not produce, or regardless of any mitigation argument he may or may not advance, if the jury perceives from the case a fact or circumstance concerning the crime or the defendant, which the jury deems to be mitigating, it may treat it as such. As to mitigation, it is only the risk of non-production or non-persuasion which the defendant bears."

Petitioner, who was armed with a gun. In that trial the jury acquitted Kanaras of any criminal involvement in Hudson's death, but convicted him of felony murder, daytime housebreaking, and theft relating to the murder of Becker. See, Kanaras v. State, 54 Md. App. 568, cert. denied, 297 Md. 109 (1983).

At the Kanaras trial, the State called four rebuttal witnesses to refute certain accounts of the events given by Kanaras and to rebut his credibility with regard to the claim of duress. One of these was an acquaintance named Stephen Rassa. In offering Rassa's testimony, the State proffered that he would testify that a week prior to the murders, Rassa had to dissuade Kanaras from robbing Hudson and stealing his cocaine. Id. at 589. The trial court only allowed the jury in the Kanaras case to consider Rassa's testimony on the issue of credibility, and not as substantive evidence of guilt. In approving the admission of the Rassa testimony and that of other rebuttal witnesses on appeal, the Court of Special Appeals pointed out that the central issue in the killings was drugs and that it was important for the State to show "...that Kanaras both needed and lusted for money and participated in prior drug transactions, and may have specifically considered robbing Hudson." Id. at 595.

At the Kanaras trial Rassa testified that he and Kanaras were together one day about a week prior to the murders. He and Kanaras went to Hudson's trailer to buy cocaine. Rassa was nervous because he had had a prior undisclosed

conversation with Kanaras about Hudson and Becker. Kanaras went to get his gun prior to entering the Hudson trailer. When asked, Kanaras told Rassa that he was going to show Rassa the gun. Rassa asked Kanaras if he could shoot and rob someone or stab someone in daylight, and Kanaras allegedly answered in the negative, but suggested that Rassa could do so. The two men then completed a cocaine sale with Hudson without mishap. On cross-examination Rassa admitted that he, not Kanaras, first brought up the subject of robbing and killing Hudson.

In the middle of Rassa's cross-examination, a recess was called in the Judge's Chambers to determine Rassa's mental competency to testify. Kanaras' attorney moved for a psychiatric examination, and asked that the State be required to produce any pscyhiatric records it had or could obtain. The trial judge made several highly unusual observations. He opined that Rassa's whole demeanor on the witness stand raised serious questions in the judge's mind as to Rassa's credibility and noted that if he were the trier of fact he wouldn't "pay a bit of attention" to Rassa's testimony. Apparently this was because of Rassa's peculiar and delayed manner of answering questions. The judge noted that he didn't know if Rassa was thinking up a lie or was mentally impaired. Rassa was called into chambers and questioned on the extent of his prior drug use. When he resumed the stand, Rassa admitted to use of PCP two weeks prior to the Kanaras trial and LSD three months prior, as well as the prior

extended use of those two drugs, marijuana, cocaine, hashish, amphetamines and tranquilizers. Even though the judge had opined that Rassa's demeanor "destroys his credibility as far as I'm concerned", he concluded the jurors were people of common sense and could arrive at that conclusion on their own.

At Petitioner's subsequent trial, his defense counsel moved that the Court admit Rassa's transcribed rebuttal testimony from the Kanaras trial under the former testimony exception to the hearsay rule.[5] Petitioner's defense proffered that the testimony would demonstrate to the jury that Rassa had to stop Kanaras from killing the victims a week prior to their actual murder. The State disputed such characterization, proffering that the testimony showed only that Kanaras had attempted to recruit someone to commit a robbery, consistent with the State's theory of the crime. The Court denied use of the transcript on the ground that Rassa had been a State's witness at the Kanaras trial involving a different defendant and the State had had no opportunity to fully cross-examine Rassa upon the issue which the defense sought to prove. The Court of Appeals affirmed, on the ground that, under the circumstances of this case, the Rassa transcript did not qualify for admission as former testimony due to the State's lack of opportunity to examine Rassa with regard to the issue Petitioner sought to prove with the testimony at his subsequent trial.

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[5]The actual transcript was never offered to the trial judge, but was added to the record on appeal to the Court of Appeals.

Petitioner states that the issue presented for this Court's review is whether he was deprived of his constitutional right to due process and compulsory process by the Maryland Court's decision to exclude the Rassa testimony. This ignores the fact that these constitutional arguments were simply not presented to the trial judge. Rather, Petitioner argued at trial that the Rassa testimony should be admitted under the evidentiary law relating to former testimony, as previously set forth. On appeal before the Court of Appeals, Petitioner did set forth several grounds in support of his allegation that admission of the transcript had been erroneously denied, including an assertion that the ruling denied him due process. Respondent asserted before that Court that the constitutional claim had not been presented to the trial judge when the Petitioner sought admission of the evidence, and was not preserved for review on direct appeal under Maryland law. See, Maryland Rule 885 (Appellate Court will ordinarily not decide any point or question not tried or decided in trial court). Maryland Rule 885 has been applied by the Maryland Court of Appeals in numerous death penalty cases, notwithstanding that Court's observation that it will be less strictly applied in such cases. Foster, Evans & Huffington v. State, 305 Md. 306, 318 (1986) (on Motions For Reconsideration); Thomas v. State, 301 Md. 294, 330 (1984); Calhoun v. State, 297 Md. 563, 601 (1983); Johnson v. State, 292 Md. 405, 412 n.3 (1982). Further, it is a well established principle of Maryland Law

that where counsel has presented a specific but different ground for admission of evidence at trial, he will be held to those grounds and all others not specified are considered waived. von Lusch v. State, 279 Md. 255, 263 (1977); Thomas v. State, supra.

In this case the Court of Appeals found, as a matter of evidentiary law, that the Rassa testimony did not qualify for admission against the State under the former testimony exception to the hearsay rule. However, it did not address Petitioner's due process claim. As the Maryland appellate court declined to address the constitutional issue, it must be assumed that that Court did not view the issue properly preserved under the aforestated well established procedural law. Accordingly, Petitoner's constitutional claim is not preserved for direct review to this Court based on this independent procedural ground. Hess v. Indiana, 414 U.S. 105, 106 n.2 (1973); Wardius v. Oregon, 412 U.S. 470, 477 n.10 (1973); Moore v. Illinois, 408 U.S. 786, 799 (1972); Wainwright v. Sykes, 433 U.S. 72, 87 (1977), citing Henry v. Mississippi, 379 U.S. 443 (1965).

Additionally, it is a well established principle of federalism that this Court will not review a State decision resting on adequate and independent substantive State law. Wainwright v. Sykes, supra, at 81, citing Fox Film Corp. v. Muller, 296 U.S. 207 (1935), and Murdock v. Memphis, 20 Wall 590, 22 L.Ed. 429 (1875). This principle includes State decisions founded on State evidentiary law. Moore v.

Illinois, supra. In this case the Court of Appeals applied the common law of evidence, as established in its prior cases, scholarly authorities, and the Federal Rules relating to the admissibility of former testimony of an allegedly unavailable witness. Specifically, the Maryland Court of Appeals applied the well established requirement that the party against whom the prior testimony is offered, and who is deprived of the opportunity for cross-examination, must have had a similar motive and purpose to develop the testimony at a prior proceeding, such that the prior examination of the witness was a fair equivalent of what it would have been in the subsequent proceeding. That is a specific requirement of Federal Rule 804(b)(1), providing for admission of former testimony in federal cases, and decisons that have interpreted it. See, United States v. Adkins, 618 F.2d 366 (5th Cir. 1980); Peterson v. United States, 344 F.2d 419 (1965). See also, Commonwealth v. Meech, 403 N.E.2d 1174, 1175-1178 (Mass. 1980); Crawford v. State, 282 Md. 210 (1978); Yellow Cab Co. v. Henderson, 183 Md. 546, 556 (1944); Brooks v. State, 35 Md. App. 461, 469-470 (1961); McCormick, Evidence, §255-257 (3rd.Ed. 1984); Wigmore on Evidence, §1386-7 (Chadbourn Rev. Ed. 1974). This requirement of the hearsay exception insures that the hearsay as used is reliable and promotes a fair hearing for both parties. Further, the restriction may be invoked on behalf of the government in a criminal case, as well as on behalf of the accused. As stated by the Fifth Circuit Court of Appeals in Atkins, supra, at 373, the

criminal accused may not use testimony which the government elicited on a different issue at a prior hearing to prove, by implication, a defense issue which the government could well have refuted had it developed the testimony with the later issue in mind.

Here the Maryland Court of Appeals held that Rassa's testimony at the Kanaras trial had been developed and admitted on an entirely different issue than that for which it was offered at Petitioner's trial. At the Kanaras trial, the State sought only to refute Kanaras' denials that he was involved in drugs and needed money. The rebuttal testimony was relative to his intent and motive, as he claimed duress. It was not admitted as substantive evidence of his guilt, but only on the issue of his credibility. It was thus obviously not introduced to prove that Kanaras was the person who actually killed the victims Becker and Hudson, as principal in the first degree, to the exclusion of Petitioner. That was never the State's theory of the offense, as best evidenced by the fact that the State did not seek the death penalty in the Kanaras case. Thus, the State's motive during its examination of Rassa was not the fair equivalent of what it would have been on the issue which Petitioner sought to disprove at his own trial: that he was the principal in the first degree in the murders, either alone or with Kanaras' participation.

Even if Petitioner had presented the due process challenge to exclusion of the Rassa transcript as former testimony, that assertion lacks merit. Respondent recognizes

that in unique circumstances this Court has held that due process may require admission of crucial but reliable defense evidence in a criminal case, even though such evidence is not admissible under State evidentiary law. Chambers v. Mississippi, 410 U.S. 284 (1973); Green v. Georgia, 442 U.S. 95 (1979). In Chambers this Court recognized that in very limited situations the due process clause is offended when hearsay prohibitions are applied "mechanistically to defeat the ends of justice." Id. at 302. However, this Court expressesly noted that the hearsay rule is recognized and applied in virtually every State and "...grounded in the notion that untrustworthy evidence should not be presented to the triers of fact..." Id.at 298. Accordingly, the Chambers decision did not establish a new principle of constitutional law or "...signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures." Id. at 303. In both Chambers and Green v. Georgia, supra, the State Courts excluded, on the basis of evidentiary law, third party confessions to the murders for which those defendants were accused. The confessions were made shortly after the murders occurred, spontaneously to friends of the confessing parties. The confessions bore "persuasive assurances of trustworthiness" and reliability, and were critical to the defense. The hearsay statements were clearly against interest. In Chambers, the third party confession was extensively corroborated as well, but found inadmissible in

part due to Georgia's nonrecognition of the hearsay exception for declarations against penal interest. Chambers v. Mississippi, supra at 298-300. The Maryland Court of Appeals has previously applied the principle of Chambers and Green in capital cases where appropriate. See, Foster v. State, 297 Md. 191 (1983).

Here, the Rassa testimony involved no confession to the crime. It was nothing more than Rassa's impression that Kanaras intended a robbery a week prior to the killings, which was wholly consistent with the State's theory of the case. According to Rassa, he initiated and subjectively interpreted the entire conversation. His testimony was not independently corroborated. Most importantly, however, it was inherently unreliable and untrustworthy in the form of a transcript, in light of Rassa's apparent drug related mental impairment, a factor which could obviously only be assessed by a live viewing of his demeanor on the witness stand. The comments of the judge at the Kanaras trial made clear that, but for the jury's ability to view Rassa's remarkable manner of testifying in order to assess his veracity, his testimony might have been entirely struck as being unreliable as Kanaras' defense counsel had requested. The State's Attorney agreed with the judge on that point. Thus, the former Rassa testimony, in the form of a cold transcript, was inherently untrustworthy. For all of these reasons, this issue does not warrant the review by this Court.

III.

MARYLAND STATUTORY INDICTMENT FORM SUFFICIENTLY CHARGED PETITIONER WITH FIRST DEGREE MURDER.

As a third basis for review, Petitioner alleges that Maryland's statutory short form indictment charging first degree murder was inadequate, as a matter of due process, to charge him with the crime of felony murder. He was charged in the language set forth by the Maryland Legislature at Maryland Code Annotated, Art. 27 §616. In accordance with that statute, the grand jury charged that Petitioner "...unlawfully, willfully and of deliberately premeditated malice aforethought did kill and murder..." Becker and Hudson. Following the statutory language, each indictment cited: ("Murder, First Degree Art. 27, §407, 410, 413, 616.") Maryland Code Annotated Art. 27 §410 declares that murder committed in the course of certain enumerated felonies, including robbery and daytime housebreaking, shall be murder in the first degree.

Petitioner's constitutional challenge to Maryland's short form indictment for murder, though meritless, has been waived for appellate review under Maryland's procedural law. Petitioner failed to challenge the indictment in accordance with Maryland Rule of Procedure 4-252(a), (former Maryland Rule 736a) which mandatorily requires that certain motions be made thirty days after a defendant's first appearance in court or the entry of counsel's appearance, including those charging "[a] defect in the charging document other than its failure to

show jurisdiction in the court or its failure to charge an offense." See also, Williams v. State, 302 Md. 787 (1985). Accordingly, the Maryland Court of Appeals expressly held that Petitioner had waived any constitutional challenge to the indictment. [Appendix p. 27]. That Court's ruling presents an independent and adequate State procedural waiver barring review of the issue by this Court, based on the authority previously set forth herein in Argument II, supra. The Maryland procedural requirement is obviously necessary to promote the interests of judicial economy, speedy trial, and fairness to the State. When such challenges are made prior to trial, indictments may be newly drawn or amended where necessary. Indeed, if Petitoner's allegation that he has not been charged with felony murder were true, the State could now reindict him for what he erroneously alleges to be a separate offense, thus requiring, unnecessarily, a belated retrial. Thus, this Court should decline, as did the Maryland Appeals Court, to address the issue now.

Even if the due process allegation had been properly preserved by Petitioner, the language in the Maryland short form indictment for murder has long been established as sufficient to charge all species of murder, including felony murder, under Maryland case law. Contrary to Petitioner's assertion, the Maryland appellate courts have not recognized two forms of first degree murder. Rather, murder as developed in Maryland common law was a single crime. When the General Assembly enacted statutes dividing that common law crime into

degrees, and enacted the specific statute making murder in the course of enumerated felonies first degree murder, it did not intend, as interpreted by the Maryland Court of Appeals, to create new or separate crimes of murder. Rather, the Maryland murder statutes merely provide mitigation for second degree murders and a number of species of first degree murder, including felony murder. Wood v. State, 191 Md. 658, 666-667 (1948); Hardy v. State, 301 Md. 124, 137 (1984).

The term "murder" has been defined in the English and Maryland case law as a killing with "malice aforethought". Wood v. State, supra. Actually, though, malice is the mens rea of murder and includes four possible species under Maryland law -- 1. an express intent to kill; 2. an intent to do grevious bodily harm; 3. an intent to do a wantonly life endangering act; and 4. an intent to commit a dangerous felony. Evans v. State, 28 Md. App. 640, 701 (1975), aff'd. 278 Md. 197 (1976). The term "malice aforethought" has thus evolved as a term of art including any or all of these species of the mens rea element of murder. Wood v. State, supra. Additionally, "willful, deliberate and premeditated" has so dominated the literature and case law relating to common law murder, that it has become the "universal statement of the offense." Evans v. State, supra.

Based on this analysis of the law of murder, the Maryland Court has determined that an indictment in the language here used, as sanctioned by the Maryland Legislature, is sufficient to charge all types of murder. Wood v. State, supra at 667;

Robinson v. State, 298 Md. 193, 201-202 (1983). This Court has held that whether or not a State indictment is sufficient to charge the crime of murder under the law of that State is an issue for the State court to determine. Kohl v. Lehlback, 160 U.S. 293 (1895); Bergemann v. Backer, 157 U.S. 655, 659 (1985). Justice Harlan, writing for this Court in the Bergemann case, held that a New Jersey statutory form indictment for murder utilizing language similar to Maryland's short form, was sufficient to charge all species of murder based on a state law interpretation of the common law similar to that previously applied by the Maryland Court of Appeals. Bergemann v. Backer, supra at 658-659.

Additionally, the indictments in Petitioner's case specifically set forth the statutory sections upon which the State intended to rely to show first degree murder, including a section relating to felony murder. Obviously, in light of all of the above, due process was not violated because Petitioner was fully advised of the crime with which he was charged and, was not subject to future prosecutions arising out of the same murders. See, United States v. Miller, 105 S.Ct. 1911, 1914, 85 L.Ed.2d 99 (1985).

Numerous state and federal cases have addressed this precise issue and concluded that language similar to that employed in the Maryland indictment is sufficient to charge felony murder. See, Blake v. Morford, 563 F.2d 248 (6th Cir. 1977); Bizup v. Tinsley, 211 F.Supp. 545 (D. Col. 1962), aff'd.,316 F.2d 284 (10th Cir. 1963), mandamus and other

relief denied, 375 U.S. 990 (1964); People v. Murtishaw, 29 Cal. 3rd 733, 175 Cal. Rptr. 738, 631 P.2d 46, 455 n.11 (1981), cert. denied, 455 U.S. 922 (1982). See also, State v. Stephens, 93 N.M. 458, 601 P.2d 428, 431 (1979); State v. Foy, 224 Kan. 558, 582 P.2d 281, 288 (1978); Commonwealth v. Bastone, 466 Pa. 548, 353 A.2d 827, 830 (1976). Accordingly, this issue clearly does not warrant further review by this Court.

CONCLUSION

For the foregoing reasons, the State of Maryland prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of June, 1986, the Brief and Appendix in Opposition to Petition for Writ of Certiorari was mailed to the Court and copies thereof were mailed to George E. Burns, Jr. and Michael R. Braudes, Assistant Public Defenders, Second Floor, 312 North Eutaw Street, Baltimore, Maryland, 21201, Counsel for Petitioner.

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APPENDIX A

304 Md. 539, 574 (1985)

IN THE COURT OF APPEALS OF MARYLAND

NOS. 64 and 133

SEPTEMBER TERM, 1984

JOHN NORMAN HUFFINGTON

v.

STATE OF MARYLAND

Murphy, C.J.
Smith
Eldridge
Cole
Rodowsky
Couch
McAuliffe,

JJ.

Opinion by Smith, J.
Eldridge, Cole and McAuliffe, JJ., dissent

Filed: November 13, 1985

We shall affirm the conviction and sentence of John Norman Huffington in this, his third trip to this Court, the second after a death sentence. His first trip was reported in Huffington v. State, 295 Md. 1, 452 A.2d 1211 (1982), where we reversed and remanded for a new trial. Upon the remand after that reversal the case was removed to the Circuit Court for Frederick County for trial. In Huffington v. State, 302 Md. 184, 486 A.2d 200 (1985), we rejected his contention that to again try him would place him in double jeopardy. After our per curiam order in that case (but before the filing of the opinion) Huffington was tried in the Circuit Court for Frederick County. A jury convicted him of two counts of first degree murder, breaking and entering, and handgun offenses. The same jury sentenced him to death for each murder. The case reaches us under the provisions of Maryland Code (1957, 1982 Repl. Vol.) Art. 27, § 414 providing for automatic review by this Court whenever the death penalty is imposed.

The facts surrounding the incident leading to Huffington's conviction are fully set forth in our earlier opinion. We shall here set forth only such facts as are necessary to a clear understanding of each of the issues presented by

of Rassa's testimony at the Kanaras trial in Kent County. He sought its admission as prior evidence to establish that Kanaras might have killed the victims in the case at bar. The trial judge denied admission, stating:

> "The whole thrust of the cases in this area is that the right of cross-examination be fully afforded, and if it has not been afforded, then it is not only a violation of Article 21 of the Maryland Constitution but also before [sic] the amendment to the United States Constitution. It's clear from the proffered testimony in this case, and I find as a fact, that in the trial in which the Rassa transcript is sought to be used, Mr. Rassa was the State's witness, and accordingly, to grant your motion I would be depriving the State of its right to cross-examine fully Mr. Rassa in this case, which is a different case from the present case. The case in which the transcript is from, as I understand it, is the State v. Kanaras rather than the State v. Huffington, and so the situation is entirely different from the situation which caused me to grant the State's motion in connection with the Bognani testimony. Accordingly, the motion is denied."

There is no dispute here on the issue of Rassa's availability as a witness.

The rule applicable to prior testimony was set forth for the Court by Chief Judge Murphy in Crawford v. State, 282 Md. 210, 383 A.2d 1097 (1978):

> "Our predecessors have consistently held that testimony taken at a former trial may as a general rule be admitted at a subsequent trial where it is satisfactorily shown that the witness is unavailable to testify. Contee v. State, 229 Md. 486, 184 A.2d 823 (1962); Bryant v. State, 207 Md. 565, 115 A.2d 502 (1955); Hendrix v. State, 200 Md. 380, 90 A.2d 186 (1952). These cases generally recognize that where an opportunity was afforded to the accused to cross-examine the witness at the

> for saying that the accused should never lose the benefit of any of these safeguards even by the death of the witness; and that, if notes of his testimony are permitted to be read, he is deprived of the advantage of that personal presence of the witness before the jury which the law has designed for his protection. But general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case. To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot free simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent. The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused." 156 U.S. at 242-43, 15 S. Ct. at 339-40, 39 L. Ed. at 411.

On the issue in question see Annot., 15 A.L.R. 495 (1921), and the supplements thereto, 79 A.L.R. 1392 (1932), 122 A.L.R. 425 (1939), and 159 A.L.R. 1240 (1945). Obviously, as pointed out in 15 A.L.R. at 559, there can be no constitutional objection to admission of evidence on behalf of an accused in a criminal proceeding. The further observation is made that in admitting testimony on behalf of an accused courts generally have followed the rules which they have adopted with respect to permitting or rejecting testimony in favor of the prosecution.

On the problem at hand E. Cleary, McCormick's Handbook of the Law of Evidence, § 254 (3d ed. 1984) states:

> "Usually called 'former testimony', this evidence may be classified, depending upon the precise formulation of the rule against hearsay, as an

> important feature of the former-testimony exception is that which requires such testimony to have been given in a situation where an opportunity existed to utilize that truth-testing device. The former-testimony exception to the hearsay rule is unique in this respect, as no other exception makes cross-examination a requirement for admissibility, and it is not usually discussed in connection with evidence admitted under other exceptions. It was this opportunity to cross-examine which led Wigmore to characterize former testimony as unobjectionable under the hearsay rule, rather than as admissible as one of its exceptions. In order to ensure the reliability of former testimony, the proposed Federal Rules retain the requirement that the opponent be given the opportunity to develop the testimony by cross-examination." Id. at 553-54.

Professor Martin says, "[The] crucial question is whether, given that the opponent can not now cross-examine the witness, the examination on the prior occasion was fairly equivalent to cross-examination in the present situation." Id. at 556.

Fed. R. Evid. 804(b)(1) states:

> "(b) Hearsay exceptions.--The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (1) Former testimony.--Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."

'meaningful in the light of the circumstances which prevail when the former testimony is offered.'" Id. 804-74 to -76. (Emphasis in original.)

The case relied upon by the State that is closest to the factual situation before the Court is Commonwealth v. Meech, 380 Mass. 490, 403 N.E.2d 1174 (1980). There the defendant attempted to introduce at his trial testimony given by a witness for the prosecution before the grand jury. The court said:

"The common model for the exception is one where the prior testimony was given by a person, now unavailable, in a proceeding addressed to substantially the same issues as in the current proceeding, with reasonable opportunity and similar motivation on the prior occasion for cross-examination of the declarant by the party against whom the testimony is now being offered....

"The usual formula would not be fulfilled if grand jury testimony were subsequently offered against the indicted defendant, for he would not have had a chance to cross-examine. See United States v. Fiore, 443 F.2d 112, 115 & n. 3 (2d Cir. 1971), cert. denied, 410 U.S. 984 (1973). Nor is it nominally fulfilled where, as here, the defendant offers the testimony against the Commonwealth, for the Commonwealth was not in the position of a cross-examiner at the grand jury hearing; rather it was presenting the testimony through direct examination. However, it has been recommended by commentators, and on occasion held by courts, that a party's having tendered the testimony on direct should serve as the equivalent for the present purpose of his having cross-examined upon it. There is some support for this view as to grand jury testimony on the theory, perhaps, that the government should be considered bound to the trustworthiness of the evidence it chose to present to the grand jury as a basis for an accusation of crime. (See, however, note 12 infra.)

> did not know, in order to establish that Inglet was dealing with someone other than Robert Atkins, whose name was known to Inglet. Defense counsel for Atkins did not participate in the James hearing, and the hearing did not concern Atkins but only some of his codefendants. In addition, the government did not contend that Atkins was the Miami supplier being discussed by Inglet in the James hearing but rather that he was the contact man. Thus, the government did not have the motivation to question Inglet in order to make him acknowledge that the Robert of whom he spoke in the James hearing was in fact Atkins. Accordingly, Inglet's former testimony did not meet the requirements of 804(b)(1) for admission, and his challenge to its exclusion by the judge is without merit. See, e.g., Peterson v. United States, 344 F.2d 419, 425 (5th Cir. 1965)." 618 F.2d at 373.

We find Atkins persuasive. It follows along with the authorities we have heretofore quoted. When the State presented the testimony of Rassa at Kanaras' trial it was in a different context and for a different purpose from that for which Huffington desires to offer it in the case at bar.[2] The motivation on the part of the State for question-

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2. We take cognizance of the fact that the dissent differs with our view as to the purpose for which the Rassa testimony was offered at the trial of Kanaras. We point out that in Kanaras v. State, 54 Md. App. 568, 460 A.2d 61, cert. denied, 297 Md. 109 (1983), Judge Alpert said for the Court of Special Appeals:

> "In the instant appeal, the rebuttal testimony clearly explained and replied to the evidence which had been offered by the appellant in his defense. Kanaras had agreed to the accuracy of the language of the statement which he had given Saneman, which included the response that 'I never sold drugs. I always bought them.' Thus, the State was entitled to prove that Kanaras had been involved in drug transactions as a seller. Judge

Huffington is entitled as a matter of law to an instruction in his favor on this mitigating factor.

There is both a short and a somewhat longer answer to Huffington's contention. The short answer is that at no time did he request such an instruction. Not having requested such an instruction, the point is deemed waived. Maryland Rule 885.

A somewhat longer answer is that the sentencing authority, in this instance the jury, would be expected to return its finding based upon the evidence adduced before it. Evidence of Kanaras' conviction was not adduced. Had it been, the finding made by the jury at Kanaras' trial would not be binding upon the jury at Huffington's trial because it would not be based upon the same evidence.

The real answer is that contained in Evans v. State, Md. , A.2d (1985), [Nos. 66 and 98, September Term, 1984, decided Nov.12,1985] where Judge Eldridge said for the Court:

> "[W]e conclude that the General Assembly intended the words 'proximate cause' to apply only to direct physical causes of the victim's death, and not to acts of a principal in the second degree or an accessory before the fact which aided or abetted the act directly causing death." Md. at , A.2d at .

Footnote 16 of that opinion provides further clarification:

> "The type of situation which the Legislature likely had in mind by the language of § 413(g)(6) is illustrated by the following. If the perpetra-

Huffington contends that the trial court erred in admitting two portions of the presentence investigation report. The first concerns that portion of institutional history pertaining to infractions not leading to criminal prosecutions committed while Huffington was incarcerated prior to trial. The second pertains to the admission of Huffington's version of the facts pertaining to his activities at the times here pertinent.

For reasons to be hereafter developed we find Huffington's contentions to be without merit. There is another reason for overruling his contentions, however. The presentence investigation came in without objection. It is true that when the presentence investigation was being considered by the trial judge Huffington made specific objections to the portions of the report to which he now objects. However, the report was received in evidence without objection on behalf of Huffington. The record reflects:

> "Cassilly [Assistant State's Attorney]: Excuse me, Your Honor, could we ... now that we've finally gotten our presentence put together, can we distribute this to the Jury at this point?
>
> "Court: You'll want to put that in? Yes.
>
> "Cassilly: Yes, please.
>
> "Drew [for the defense]: I have no objection, Your Honor, if you want....
>
> "Court: All right, it will be received and may be distributed to the Jury. (St. Ex. 5

> habits, mental and moral propensities, social background and any other matters that a judge ought to have before him in determining the sentence that should be imposed. Skinker v. State, 239 Md. 234, 210 A.2d 716 (1965); Scott v. State, 238 Md. 265, 208 A.2d 575 (1965); Costello v. State, 237 Md. 464, 206 A.2d 812 (1965); Driver v. State, [201 Md. 25, 92 A.2d 570 (1952)]; Baker v. State, [3 Md. App. 251, 238 A.2d 561 (1968)]. The sentencing judge may, but need not, obtain a presentence report under Article 41, § 124 (b). Of course, the sentencing judge may take into consideration the defendant's conduct after the offense was committed, viz., he may consider evidence of events occurring after the date of the original sentencing to whatever extent he may deem necessary. North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed.2d 656 (1969); Williams v. New York, 337 U.S. 241, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949); Purnell v. State, [241 Md. 582, 217 A.2d 298 (1966)]; Gatewood v. State, 15 Md. App. 450, 291 A.2d 688 (1972)." 267 Md. at 193-94, 297 A.2d at 706.

More recently in Logan v. State, 289 Md. 460, 425 A.2d 632 (1981), Judge Digges said for the Court:

> "In considering what is proper punishment, it is now well-settled in this State that a judge is not limited to reviewing past conduct whose occurrence has been judicially established, but may view 'reliable evidence of conduct which may be opprobrious although not criminal, as well as details and circumstances of criminal conduct for which the person has not been tried.' Henry v. State, 273 Md. 131, 147-48, 328 A.2d 293, 303 (1974)." 289 Md. at 481, 425 A.2d at 643.

We are not concerned here with crimes, as in Scott v. State, 297 Md. 235, 465 A.2d 1126 (1983), with which an accused was charged but had not yet been convicted. We believe that under our prior cases this institutional history was properly admissible.

> establish an alibi by attending a local 'fiddler's convention.' Kanaras remained with Appellant and refrained from informing anyone of the killings even after the disposal of the gun and knife used in the homicides because he remained 'scared' of Appellant."

The version obtained by the Parole and Probation agent as set forth in the presentence investigation report was as follows for the critical period:

> "About 1:45 a.m. the defendant and Kanaras left the Golden 40 and followed Hudson's car to an Edgewood 7-11 Store and then to Hudson's Motorhome. Diane Becker walked over to their car and asked them to wait until the people in the other car left. After the other vehicle left, the defendant and Kanaras entered the motorhome and all four (4) sat down. Hudson and the defendant discussed a future cocaine deal and Kanaras bought some cocaine from Hudson, after which Huffington and Kanaras left. They drove back to Huffington's apartment and both went inside. Kanaras allegedly wanted to party, but the defendant said he was tired and wanted to go to bed. Kanaras then left and the defendant went to sleep.
>
> "On 5/25/81 at about 9 a.m., Kanaras returned to Huffington's apartment and asked him to go partying. After showering, the defendant and Kanaras did some cocaine and drove around, heading toward the Fiddler's convention in Cecil County....
>
> "About 6:30 p.m. Kanaras called him asking him to cover for him, to tell anyone who asked, that they were at the Fiddler's Convention all night. The defendant claimed that at that time he did not know why Kanaras asked him to cover for him....
>
> "The defendant stated that he protected Kanaras with an alibi. He claimed that Kanaras never explained why he needed an alibi. The defendant denied participation in the crimes and denied his guilt to the charges. When asked if he had knowledge of or a hunch who committed the

We simply do not find Estelle or Huffington's Fifth Amendment rights applicable to the statement in the case at bar. We have set forth Huffington's version of the evidence and the statement in question at some length in order that there may be no misunderstandings. It is true that Huffington in his statement indicated that he had been in the company of Kanaras and of the victims, Diane Becker and Joseph Hudson. However, according to the statement given by Huffington, at the time when the alleged crimes were being committed he was home by himself and asleep. We find no infringement of Huffington's rights against self-incrimination.

iv. Victim participation

Code (1957, 1982 Repl. Vol.) Art. 27, § 413(g)(2) provides that a mitigating factor shall be that "[t]he victim was a participant in the defendant's conduct or consented to the act which caused the victim's death." Huffington contends that Hudson was a participant in the conduct leading to his death and hence Huffington was entitled as a matter of law to this mitigating factor.

Art. 27, § 413(g), enacted by Ch. 3 of the Acts of 1978, is modeled after § 210.6(4)(c) of the Model Penal Code. The latter states relevant to mitigating factors, "The victim was a participant in the defendant's homicidal

> "Ah, I parked the car, and where the car was parked it wasn't too much room on each side of the road, it was like a slight embankment on one side and an embankment on the other side, so two people really couldn't fit together coming out of the car, so I got out of the driver's side of the car and Joe Hudson got out of the passenger side of the car, and we met at the -- the back of the car, and John Huffington was right behind too, about three or four steps, and as we walked up to the house, that's when I heard these shots -- four or five shots rang out, and I saw Joe Hudson fall - fall to the ground to his -- on his side, and he rolled -- he rolled over ...."

This was the evidence before the jury. It does not make Hudson out as a participant in Huffington's conduct which caused Hudson's death. According to the testimony Hudson and Huffington were joint participants and co-conspirators in an alleged drug sale. The conduct which caused Hudson's death related to Huffington's carrying and concealing a loaded pistol and the firing of such pistol at Hudson's back. It is beyond the stretch of anyone's imagination to say that Hudson participated in this conduct.

We have recently stated, "It is the accused's burden to prove, by a preponderance of the evidence, the existence of a mitigating circumstance. [Section] 413(g); Tichnell v. State, 287 Md. 695, 730, 415 A.2d 830, 848-49 (1980)." Stebbing v. State, 299 Md. 331, 361, 473 A.2d 903, 918 (1984). In the case at bar Huffington failed to carry his burden concerning proof of the mitigating factor that Hudson participated in the acts causing his death. Moreover, the

> State's response to the defense's offer was some indication that the death penalty was not appropriate in this case. The State protested such action below and it is the State's position here on appeal that this procedure gave Appellant more than he was entitled to."

In Calhoun v. State, 297 Md. 563, 468 A.2d 45 (1983), the accused mounted an attack upon our death sentence statute based upon what he called the prosecutor's "unbridled exercise of discretion" under Art. 27, § 412(b). We considered Gregg and Furman and concluded:

> "Absent any specific evidence of indiscretion by prosecutors resulting in an irrational, inconsistent, or discriminatory application of the death penalty statute, Calhoun's claim cannot stand. To the extent that there is a difference in the practice of the various State's attorneys around the State, our proportionality review would be intended to assure that the death penalty is not imposed in a disproportionate manner." 297 Md. at 605, 468 A.2d at 64.

We do not regard consultation with the family of the victim here, after the State had already made a decision to seek the death penalty and after trial had begun, as any evidence of indiscretion by a prosecutor. We hold this contention to be without merit.

vi. The indictment

At Huffington's first trial a special verdict form was used. The jury convicted him of two felony murders and specifically acquitted him on charges that the two murders were premeditated. Huffington v. State, 302 Md. 184, 186,

rejected in Huffington v. State, 302 Md. 184, 486 A.2d 200 (1985).

In Williams v. State, 302 Md. 787, 490 A.2d 1277 (1985), Chief Judge Murphy recently said for the Court:

> "Under Maryland Rule 4-252(a) (formerly Rule 736a), a motion alleging a 'defect' in the charging document 'other than its failure to show jurisdiction in the court or its failure to charge an offense' must be filed within a designated time period prior to trial or the defect is waived.[2] The rule provides in subsection (c) that a motion 'asserting failure of the charging document to show jurisdiction in the court or to charge an offense may be raised and determined at any time.' A claim that a charging document fails to charge or characterize an offense is jurisdictional and may be raised, as here, for the first time on appeal. See Putnam [v. State, 234 Md. 537, 200 A.2d 59 (1964)]; Baker [v. State, 6 Md. App. 148, 250 A.2d 677 (1969)]; Maryland Rule 885. Where the claimed defect is not jurisdictional, it must be seasonably raised before the trial court or it is waived.
>
> ---
>
> "2. For good cause shown, the rule permits the trial court to order otherwise." 302 Md. at 792, 490 A.2d at 1279-80.

To like effect see Hall v. State, 302 Md. 806, 809, 490 A.2d 1287, 1288 (1985). It follows, therefore, that any constitutional claim is waived because there was not a motion filed within the time limited by the rule.

The indictment was in the statutory form. Judge Cole recently said for the Court in Robinson v. State, 298 Md. 193, 202, 468 A.2d 328, 333 (1983), "[A]t least as a matter of state non-constitutional law, the legislatively enacted

98, September Term, 1984, decided November 12, 1985]; Colvin v. State, 299 Md. 88, 122-27, 472 A.2d 953, 970-72 (1984); Calhoun v. State, 297 Md. 563, 635-38, 468 A.2d 45, 80-81 (1983), and Tichnell, 287 Md. at 720-34, 415 A.2d at 843-50. We deem the matter to be settled.

viii. Multiple murders

Huffington contends that the State improperly used the death of more than one person as an aggravating factor while at the same time seeking two death sentences.

Code (1957, 1982 Repl. Vol.) Art. 27, § 413(d)(9) lists that "[t]he defendant committed more than one offense of murder in the first degree arising out of the same incident" as an aggravating circumstance which may be considered by the sentencing authority. Separate findings and sentencing determination forms were submitted to the jury pertaining to the death of each of the victims. In each instance the jury found that the defendant committed more than one offense of murder in the first degree arising out of the same incident. In each instance the jury also found as an aggravating factor that Huffington committed the murder while committing or attempting to commit robbery, arson, or rape or sexual offense in the first degree, a factor spelled out in Art. 27, § 413(d)(10).

Huffington argues:

> "(3) Whether the evidence supports the jury's or court's finding that the aggravating circumstances are not outweighed by mitigating circumstances; and
>
> "(4) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

We do not find the death sentence here to have been imposed under the influence of passion, prejudice or any other arbitrary factor. We find that the evidence supports the jury's finding of statutory aggravating circumstances under § 413(d). We further find that the evidence supports the jury's finding that the aggravating circumstances are not outweighed by mitigating circumstances.

We turn to the proportionality review to determine whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

In Thomas v. State, 301 Md. 294, 483 A.2d 6 (1984), Chief Judge Murphy said for the Court:

> "The principles governing proportionality review of a death sentence in Maryland have been stated in a number of our cases. Stebbing v. State, 299 Md. 331, 473 A.2d 903 (1984); Colvin v. State, 299 Md. 88, 472 A.2d 953 (1984); Calhoun v. State, 297 Md. 563, 468 A.2d 45 (1983); Tichnell v. State, 297 Md. 432, 468 A.2d 1 (1983). The fundamental object of the statutorily mandated appellate review process is the avoidance of the arbitrary or capricious imposition of the death penalty by affording similar treatment to similar capital cases. Tichnell, 297 Md. at 466, 468 A.2d 1. The focus of § 414(e)(4) is upon capital cases

then stole drugs from Hudson's person. It further shows that Huffington then went to Hudson's mobile home and there murdered Diane Becker by striking her with a bottle and then stabbing her thirty-three times. He took money and drugs from the home before fleeing.

In Tichnell v. State, 297 Md. 432, 469, 468 A.2d 1, 20 (1983), we set forth the "relevant universe" to be considered by us in our proportionality review. In the process of our review in this case we have considered each of the reports submitted by trial judges under Maryland Rule 4-343. We have selected eight which we deem to be "similar" within the contemplation of Art. 27, § 414(e)(4).

Lawrence Johnson. Johnson was 17 years and 10 months old at the time of the commission of his crimes. According to the report of the trial judge he and his cousin entered a dwelling house through a basement window. Once inside they went up the basement steps to the first floor where they discovered the presence of the victim, who was 78 years old, small in stature, weighed but ninety pounds and was home alone. When their demands for money were not satisfied they grabbed her and shoved her into a spare bedroom. In the course of this episode the victim was brutally beaten with a broom handle, stomped on and kicked, tied, and strangled to death.

The trial judge, as the sentencing authority, concluded that the aggravating circumstances outweighed the mitigating circumstances and imposed the death penalty.

Willie Green. Green was 40 years of age when he and an accomplice murdered two employees of a restaurant in the course of a robbery. The victims were both stabbed to death. One victim had his hands tied behind him and his throat was slit. Two aggravating circumstances were found to exist, that Green committed more than one murder in the first degree arising out of the same incident and that the murders were committed during the commission of a robbery. Mitigating circumstances found were that the defendant was not the sole proximate cause of the deaths of the victims and that it was unlikely in view of his age that he would engage in further criminal activity. The trial judge was the sentencing authority. He found by a preponderance of the evidence that the mitigating factors outweighed the aggravating factors. Accordingly, life sentences were imposed.

Eugene Sherman Colvin. Colvin broke into a house. In the course of the crime he encountered the victim who was visiting in the home of her daughter. The victim was stabbed twenty-eight times about the throat. The weapon used was an eight-inch serrated knife taken from the kitchen of the home. About $10,000 in jewelry was removed from the

or an attempt to escape from or evade the lawful custody, arrest or detention of or by an officer or guard of a correctional institution or by a law enforcement officer, and (3) the defendant committed the murder while committing or attempting to commit robbery. The only mitigating circumstance found was set forth under "[o]ther mitigating circumstances." The jury stated:

> "This jury feels that a substantial mitigating factor is the defendant's background, which has been such that he has never been integrated into society. Therefore, he has been and is unable to conform with its norms and moral values."

The jury imposed a death sentence.

Curtis Wayne Monroe. Monroe is the same Monroe mentioned relative to James Arthur Calhoun. The incident is also the same. The report of the trial judge relative to the facts, states:

> "The police officer was pulled into a room, subdued, and shot in the head by Calhoun. At the same time, Monroe began firing a handgun, wounding the assistant manager, Douglas Cummins, and firing two shots into the alarm technician, David Myers, resulting in the death of Mr. Myers."

Monroe waived a jury and elected to have the sentencing procedure before the trial judge. As an aggravating circumstance it was found beyond a reasonable doubt that Monroe "committed the murder while committing or attempting to commit robbery, arson or rape or sexual offense in the first degree." The trial judge noted two mitigating circumstances.

range. A jury found Hughes guilty of first degree murder on the basis of the fact that it was a deliberate, willful and premeditated murder as well as a felony murder.

The jury found as an aggravating factor that the murder was committed while committing or attempting to commit a robbery. As a mitigating factor it found that Hughes had not previously been convicted of a crime of violence, etc. It also checked on the sentencing form that other mitigating circumstances existed. However, it listed no such circumstances. The jury returned a sentence of life imprisonment.

Brian Keith Quickley. Quickley and two others entered a furniture store in Harford County. An accomplice lured the victim to an area of the store isolated from the cash register. Quickley there shot the victim once between the eyes and again, as he was falling, in the back of the neck. The three individuals then left the store, taking television sets with them.

The jury found one aggravating circumstance, that the defendant committed the murder while committing or attempting to commit a robbery. It found two mitigating circumstances. The first was the youthful age of the defendant at the time of the crime. The second, under "[o]ther mitigating circumstances," was:

> "The defendant is at the borderline range of intelligence with severe intellectual limitations both at the verbal and performance measured

IN THE COURT OF APPEALS OF MARYLAND

Nos. 64 and 133

September Term, 1984

JOHN NORMAN HUFFINGTON

v.

STATE OF MARYLAND

Murphy, C.J.
Smith
Eldridge
Cole
Rodowsky
Couch
McAuliffe,

JJ.

Dissenting Opinion by McAuliffe, in which Eldridge and Cole, JJ. concur.

Filed: November 13, 1985

I cannot agree that the trial judge properly excluded a transcript of the testimony of Stephen Rassa. Rassa's testimony was critical to Huffington's defense, and Rassa could not be found. Huffington therefore offered a transcript of testimony given by Rassa as a State's witness in the prosecution of Deno Kanaras, but this evidence was rejected on the ground the State had no opportunity to cross-examine its own witness. The majority recognizes that direct-examination by the party against whom the testimony is offered may be sufficient to justify the admission of previous testimony, but affirms on the basis that the motives of the State at the time it offered the evidence differed significantly from those of Huffington when he offered it. A careful analysis of the facts will disclose, however, that Huffington and the State each wanted to develop precisely the same facts from Rassa, and that each did so for the purposes of impeaching Kanaras' credibility and discrediting his claim of duress. That the State's motive in the first case was to convict Kanaras by discrediting his testimony and its motive in the second case was to convict Huffington by relying on Kanaras' testimony is simply irrelevant. It is the identity of the motives of the two parties who offer the testimony that is material, and not the shifting motives of the State.

> Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

The pivotal question, then, is whether the State had a motive similar to that of Huffington to develop the testimony of Rassa. This in turn requires a consideration of the issues intended to be addressed by the testimony in each case, and as indicated by the following advisory committee note to Fed. R. Evid. 804(b)(1) the question is whether there exists a "substantial" identity of issues.

> The common law did not limit the admissibility of former testimony to that given in an earlier trial of the same case, although it did require identity of issues as a means of insuring that the former handling of the witness was the equivalent of what would not be done if the opportunity were presented. Modern decisions reduce the requirement to "substantial" identity. Since identity of issues is significant only in that it bears on motive and interest in developing fully the testimony of the witness, expressing the matter in the latter terms is preferable. (Citation omitted).

We look first at Huffington's motive in seeking to introduce the testimony of Rassa. It was clear from the State's evidence that only two persons in

Huffington would give him some additional cocaine for providing transportation, Kanaras said he drove Huffington back to the Hudson trailer, where Hudson joined them. He then drove, at the direction of Huffington, to a rural area in Harford County and stopped near a farmhouse. According to Kanaras, he was walking alongside Hudson toward the farmhouse to meet the prospective purchaser when Huffington fired five shots into Hudson. Kanaras said that Huffington then reloaded the pistol, rolled the body of Hudson over, and fired two more shots into Hudson's head at point-blank range. Kanaras admitted that the weapon used had once been owned by him, but claimed he had sold it to Huffington about five weeks earlier.

Kanaras said Huffington then pointed the gun at him and ordered him to drive back to the trailer. Once inside the trailer Kanaras was directed to search for Hudson's money. Following a successful search, Kanaras said Huffington struck the sleeping Diane Becker several times with a heavy bottle, and then repeatedly stabbed her with a knife Huffington produced from his boot. Kanaras testified he was then forced to accept a large amount of the money that had been stolen from Hudson, and to assist Huffington in destroying or disposing of evidence and attempting to establish an alibi. Kanaras denied he had been to Hudson's trailer during

> remember that as the car was coming to a stop he turned towards me and he reached underneath of my seat, and I said, "What are you doing", and he said, "I'm getting my gun." And I said, "Leave it there. Don't get your gun. I don't want any parts of anything like this." And I looked both ways outside of the car because I didn't want to be seen. I wasn't really sure what was going to happen at that time. . . .
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> I said, "Come on, Deno, let's go in.", and he said, he reached under the seat again, and I said again, "What are you doing?", and he said, "I'm just getting my gun. I just want to show it to you," And I said, "Deno, I don't need to see your gun. I've seen it before. Just leave it there." At that time I said to Deno "Is there something you're not telling me? Do you owe Joe money?" And there was no reply. I looked at him and I said, "Do you actually think that you could actually rob and shoot somebody in the middle of a crowded trailer park like this in daylight, and do you actually think you could shoot someone?" And there was no reply. Deno then - excuse me - I said to Deno - no, excuse me again - Deno said, "I have a knife in the glove compartment." And I said, "Are you crazy? Do you actually think you could stab someone with a knife?" He said, "No, but you could", referring to myself. And I told him I didn't want any parts of any of this."

On cross-examination Rassa said that on several occasions prior to May 20th he and Kanaras had discussed the possibility of robbing Hudson, and that he, rather than Kanaras, had initiated further discussion of the subject on that day.

Hudson, and that any assistance rendered thereafter was under duress. Following Kanaras' testimony, the State offered the testimony of four rebuttal witnesses. The proffered testimony of these witnesses was summarized by the Court of Special Appeals as follows:

> It was proffered that Stephen Rassa would testify that on May 20, 1981, shortly before purchasing cocaine from Hudson and Becker, Kanaras supposedly had to be dissuaded from robbing Hudson and stealing his cocaine. It was further proffered that Dale Saunders, Jr. would testify that Huffington and Kanaras came to "shake him down for money" due on a drug debt. Maryland State Trooper Gary Aschenbach, according to the State's proffer, would testify that while working undercover in early 1981, Kanaras had purchased drugs for him, had on one occasion carried a gun in anticipation of a large drug deal, and had expressed interest in an illegal scheme to destroy a boat for money. The testimony of Thomas Wagner, according to the State, would show that Kanaras had shown him what was to be the murder weapon. Kanaras v. State, supra, 54 Md.App. at 589.

Expressing some uncertainty that all the evidence proffered by the State was properly offered as rebuttal, the trial judge allowed the State to reopen its case, and thus Rassa's testimony became a part of the State's case in chief.

The majority states that "the purport of Rassa's testimony was that a few days before the incident in question Kanaras was still involved with drugs" and that this evidence was offered in rebuttal to Kanaras' earlier testimony that he

> drug transactions, and may have specifically considered robbing Hudson. The additional State's evidence supplied a motive for the crimes and supplied evidence of advance preparation for the crimes. As such, it was admissible to show an independent intent and motive to commit the crimes.
> Kanaras v. State, supra, 54 Md.App. at 595.

The importance of Rassa's testimony to assist the trier of fact in assessing the credibility of Kanaras is perhaps best illustrated by the argument of the State's Attorney in support of the State's motion to have Kanaras called as a court's witness.[2]

> The following reasons, I'm going to basically go through a skeleton sketch of what he would testify and and why we don't believe we can believe him. His first indication would be that the first time that he had heard this particular incident or that this came about that he was aware that anybody was going to rob Joseph Hudson and Diane Becker was that night that it actually occurred--first of all, a witness tes--has testified, a State's witness has testified in a prior trial that Kanaras had discussed with him and tried to get him to rob Hudson sometime prior to this, and therefore we believe--it is the State's contention that we believe--what we believe is that Kanaras wanted to rob Hudson, didn't have the whatever to do it by himself, and continued looking for someone to help him with this robbery after that contact with that particular individual, and that he was

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[2] This motion was denied, and Kanaras was called as a State's witness.